XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(49)

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	APPELLANTS:	1. Rajan, S/o Bhakla, Aged about 29 years, 2. Bhakla, S/o Mahetra, Aged about 54 years. Both Satnami, R/o Navagaon (Ghuthera), P.S. Mungeli, Distt. Bilaspur (C.G.)
		- Versus -
	RESPONDENT:	State of Chhattisgarh, Through P.S. Mungeli, Distt. Bilaspur (C.G.)

Present:

Mr. Lokendra Sharma, Advocate with Mr. Samir Singh, counsel for the appellants.

Mr. D.K. Gwalre, Additional Public Prosecutor for the State/respondent.

Mr. Akhil Mishra, counsel for the complainant/victim.

Division Bench: **Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Dhirendra Mishra, JJ.**

ORAL JUDGMENT

(Delivered on 3rd April, 2007)

L.C. BHADOO, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 17th July, 2000, passed by the Additional Sessions Judge, Mungeli, in Sessions Trial No.237/98, whereby learned

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Additional Sessions Judge after holding accused/appellants Rajan & Bhakla guilty for commission of offence under Sections 302 read with Section 34, 325 read with Section 34 and 323 read with Section 34 of the I.P.C. sentenced each of them to undergo imprisonment for life and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for six months; to undergo R.I. for three years and pay a fine of Rs.750/-, in default of payment of fine to further undergo R.I. for three months and to undergo R.I. for one year and pay a fine of Rs.250/-, in default of payment of fine to further undergo R.I. for one month, respectively.

2. Case of the prosecution, in brief, is that in the morning of 16-5-1998 at about 6.30 a.m. calf of Uttam Kumar entered courtyard of the house of the accused persons on which accused Rajan started abusing and said "to whom the calf belongs, since last two days the calf is damaging chilli plants". On this, injured Uttam Kumar went to the house of the accused persons in order to take back the calf. On seeing Uttam Kumar, accused Bhakla assaulted him with a Lathi as a result of which he sustained injuries on lips, hands & head. In the mean time, Bahorik Ram, father of Uttam Kumar, came on the scene in order to intervene. The accused persons assaulted Bahorik Ram with Tabbal (battle axe) & Lathi. The mother of Uttam Kumar namely, Benbai also came on the scene in order to intervene. The accused persons assaulted her also. On account of the injuries sustained by Bahorik Ram, he fell in the courtyard of the accused persons. Uttam Kumar called the villagers who came and saw Uttam Kumar & Benbai in injured condition, and Bahorik Ram was lying in the courtyard of the

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accused persons. Bahorik Ram was taken to the hospital, however, on the way, he succumbed to the injuries sustained by him. Uttam Kumar lodged merg intimation Ex.P-15 and first information report Ex.P-3 based on which offence under Sections 302, 307 & 323 of the I.P.C. was registered against the appellants.

3. M.P. Tandon (PW-18), Investigating Officer, reached to Primary Health Centre, Mungeli and prepared inquest Ex.P-4 on the body of Bahorik Ram. Post-mortem was conducted on the body of Bahorik Ram by Dr. R. Bhattacharya (PW-10). He prepared the post-mortem report Ex.P-8. Injuries of Uttam Kumar & Benbai were examined and injury reports Exs.P-11 & P-12 were prepared by Dr. N.S. Chandel (PW-12) on which ulna bone of Uttam Kumar was found fractured. Bed head ticket of Uttam Kumar & Benbai Exs.P-1 & P-2 were seized. During investigation, the Investigating Officer, based on the memorandum Ex.P-4 of Rajan, seized his full shirt, one lungi and Tabbal under Ex.P-5. Blood stained soil and plain soil were seized under Ex.P-6. Lungi and one Lathi were seized form Bhakla under Ex.P-7.

4. After completion of investigation, charge sheet was filed against the accused persons in the Court of Judicial Magistrate, First Class, Mungeli, who in turn, committed the case to the Sessions Judge, Bilaspur, from where learned Additional Sessions Judge, Mungeli, received the case on transfer for trial.

5. The prosecution examined 19 witnesses at the trial. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the

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prosecution evidence, pleaded innocence and stated that they have been falsely implicated in the crime.

6. Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as aforementioned.

7. We have heard Mr. Lokendra Sharma with Mr. Samir Singh, learned counsel for the appellants, Mr. D.K. Gwalre, learned Additional Public Prosecutor on behalf of the State/respondent and Mr. Akhil Mishra, learned counsel on behalf of the complainant/victim.

8. The homicidal death of Bahorik Ram has not been disputed by Mr. Sharma. Moreover, from the ocular evidence of Uttam Kumar & Benbai, as also the medical evidence of Dr. R. Bhattacharya (PW-10), who has stated in his evidence that there were ten injuries on the body of the deceased, in left parietal region there was extradural haemotoma in the size of 10 cms. x 8 cms. x 6 cms., in the right lateral vertical region there was haemotoma in the size of 10 cms. x 8 cms. x 4 cms., there was clotted blood in the parietal occipital muscles, there was fracture of left parietal occipital bone and depression was visible, in his opinion, the cause of death was shock as a result of the injuries to head and the death was homicidal in nature, his report is Ex.P-8, it is established that the death of Bahorik Ram was homicidal in nature.

9. As far as involvement of the accused/appellants in the crime in question is concerned, Uttam Kumar (PW-2), son the deceased & injured, is the eyewitness. Benbai (PW-3), wife of the deceased & mother of Uttam Kumar, who was also the injured witness, reached on

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the spot when Bahorik Ram was lying in injured condition in the courtyard of the accused persons. Other witnesses namely, Pekhan Singh (PW-13), Ganpatram (PW-9), Veer Singh (PW-8) & Hoshlal (PW-7) are the persons who reached after the incident and they saw Uttam Kumar & Benbai in injured condition and Bahorik Ram was lying in the courtyard of the house of the accused persons.

10. Mr. Lokendra Sharma, learned counsel appearing on behalf of the accused/appellants argued that perusal of merg intimation Ex.P-15 reveals that Uttam Kumar had not stated that his mother and he sustained injuries, therefore, the evidence of these witnesses is not trustworthy. He further argued that in the first information report Ex.P-3 it has not been mentioned that both the accused persons attacked deceased Bahorik Ram and that too it has not been mentioned as to which accused attacked on which part of the body of the deceased.

11. As far as the argument of learned counsel for the appellants regarding omission in the merg intimation is concerned, perusal of merg intimation Ex.P-15 shows that it was given at 8.35 p.m. which was recorded by the Sub Inspector, whereas, first information report Ex.P-3 was lodged by Uttam Kumar at 8.45 p.m. Merg intimation Ex.P-15 is with regard to only the death of Bahorik Ram and nothing more has been mentioned in that merg. This does not bear the signature of Uttam Kumar and this information was recorded by the Investigating Officer simply regarding the death of Bahorik Ram. Therefore, it was not necessary that each and everything as to what happened at the spot was to be mentioned in this merg intimation. Ex.P-3, first information report, was given just ten minutes after the merg intimation

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Ex.P-15. Perusal of the first information report discloses the whole prosecution case regarding the beating given by Bhakla with Lathi to Uttam Kumar as a result of which the right ulna bone was fractured and he sustained other injuries. It also mentions about the assault made by accused/appellants Bhakla & Rajan with Tabbal & Lathi on the body of Bahorik Ram. It further mentions about the assault made on the body of Benbai – mother of Uttam Kumar, when she came to intervene when the accused persons were attacking her husband. Therefore, in the first information report each and every aspect has been mentioned that the manner in which the accused persons attacked Uttam Kumar, Bahorik Ram & Benbai, as such, we do not find any substance in the argument of Mr. Lokendra Sharma that there are omissions in the first information report also.

12. Another argument of Mr. Sharma was that in this case no independent witness has been examined, there are other houses in the vicinity where the incident took place.

13. Uttam Kumar (PW-2), the injured witness, has categorically stated in his evidence as to how the incident started. At about 6.30 a.m. when his calf entered the house of the accused persons, accused Rajan started abusing on which he went to take the calf back, where accused Bhakla came with Lathi and attacked Uttam Kumar. When his father came they also attacked him and in the mean time, mother of Uttam Kumar came. When he saw that the accused persons were attacking his father & mother, he went for informing and calling Sarpanch, Up-Sarpanch and other persons. In the first instance, incident occurred in the early morning, therefore, it is not necessary that all the persons in

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the vicinity should come and see the incident. Moreover, this witness immediately went to Sarpanch, Up-Sarpanch and informed about the incident, thereupon, those persons i.e. Hoshlal (PW-7), Veer Singh (PW-8), Ganpatram (PW-9) & Pekhan Singh (PW-13) came and saw Bahorik Ram lying in injured condition in the courtyard of the accused persons and they also saw Uttam Kumar & Benbai in injured condition. Therefore, in the circumstances, non-examination of other vicinity persons does not affect the prosecution case.

14. Mr. Lokendra Sharma also argued that in this case, Uttam Kumar was the trespasser, he came with Lathi and when he attacked the accused persons, in right of private defence of property and person, they attacked him. Mr. Sharma placed reliance on the judgment of the Apex Court in the matter of **Nagarathinam and Ors. Vs. State Rep. by Inspector of Police** reported in **2006 (2) ANJ (SC) (NOC) 52**.

15. We have perused the judgment of the Apex Court, but this is distinguishable on facts. In that case, both the sides sustained injuries, two persons on the one side and four persons on the other received injuries on their person. The Court held that

> "In moments of excitement and disturbed equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force. All circumstances are required to be viewed with pragmatism and any hyper technical approach should be avoided."

16. In the present case, as has been mentioned earlier, in fact there was no criminal trespass, because in order to ascertain whether a person

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entered the house of other as a criminal trespasser or not, it is necessary that the person must enter into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. There is no iota of evidence to indicate that Uttam Kumar entered the house of the accused persons with intention to insult, annoy or commit any crime. As far as the right of private defence is concerned, there is nothing on record to suggest that when Uttam Kumar entered the house of accused persons, he was carrying any weapon or he made any attempt to attack the accused persons with any weapon. There is no evidence that the accused persons sustained any injury. Moreover in their statements under Section 313 of the Cr.P.C. each of the accused has stated that they have been falsely implicated in the crime, they have further stated that in fact there was no incident at all. It is not their case that the accused came with preparation and attacked them, and in the right of private defence to person and property they attacked Uttam Kumar, Bahorik Ram & Benbai. Therefore, it is not the case of exercising the right of private defence to property or person.

17. The evidence of Uttam Kumar (PW-2) inspires confidence of the Court in which he has categorically stated about the incident as to how it was happened. Moreover he himself sustained injuries caused by accused Bhakla with Lathi, as a result of which his right ulna bone was fractured. As per the injury report Ex.P-11, he sustained one lacerated wound on upper lip as a result of which his incisor teeth was fractured, there was contusion on right forearm and ulna bone was fractured.

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Same has been proved by Dr. N.S. Chandel (PW-12) and by X-ray Ex.P-22 taken by Dr. R. Jitpure (PW-19).

18. Benbai (PW-3) has stated in her evidence that when she heard the cries, she went to the house of the accused persons in order to intervene and save her husband, but the accused persons assaulted her also. She was examined by Dr. N.S. Chandel (PW-12) and her injury report Ex.P-12 has been proved in which there was lacerated wound of both parietal regions in the size of 10 cms. x 1 cm. x bone deep and another lacerated wound on posterior aspect of right parietal region in the size of 3 cms. x 1 cm. x bone deep. So their presence on the scene is established by the injuries sustained by them. She has categorically stated that when she reached on the scene, she saw that her husband was lying in the court yard.

19. Therefore, in view of the above evidence it is established that the accused persons namely, Rajan attacked Bahorik Ram & Benbai with Tabbal (battle axe) whereas, accused Bhakla assaulted Bahorik Ram, Benbai as well as Uttam Kumar with Lathi. As per the evidence of Uttam Kumar, both the accused persons assaulted deceased Bahorik Ram with Lathi & Tabbal, therefore, common intention to cause the death of Bahorik Ram is established.

20. As far as offence under Section 325 read with Section 34 of the I.P.C. is concerned, the only evidence on record is that Bhakla assaulted Uttam Kumar with Lathi and there is nothing that Rajan was involved in the assault made on Uttam Kumar. Therefore, conviction of Rajan

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under Section 325 with the aid of Section 34 of the I.P.C. is not based on legal evidence.

21. Mr. Lokendra Sharma, learned counsel for the appellants, also relied on the judgment of the Apex Court in the matter of **Nagarathinam & others vs. State** reported in **2006 (2) C.G.L.J. 413**. On facts this judgment is also of no help to the accused persons, because in that case both the sides sustained injuries, there were two groups and the struggle started in the Panchayat meeting. The appellants were unarmed and they received knife injury. The Apex Court held that the appellants were not aggressors. But the facts of the present case mentioned above are totally different from the facts of the above case.

22. Mr. Sharma further argued that whole incident started all of a sudden when Uttam Kumar entered the house of the accused persons and there was no premeditation or preparation. When Uttam Kumar and thereafter Bahorik Ram entered the house of the accused/appellants, all of a sudden, in a heat of passion, the accused persons attacked the deceased and there is no intention of the accused persons to cause death of Bahorik Ram nor there was any motive to attack the deceased. In support of his argument, learned counsel relied upon the judgment of the Apex Court in the matter of **Umrao vs. State of Haryana & Ors.** reported in **2006 (2) ANJ (SC) (NOC) 55**.

23. In order to appreciate the arguments advanced by Mr. Sharma, learned counsel for the appellants, as also Mr. Gwalre, learned Additional Public Prosecutor and Mr. Akhil Mishra, learned counsel for

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the complainant/victim, we have perused the evidence and the above judgment.

24. Facts of the present case are very straight and simple. When the calf of Uttam Kumar entered the house of the accused persons, accused Rajan started abusing, on which Uttam went to the house of the accused persons to take back his calf, at that time, accused Bakhla assaulted Uttam Kumar with Lathi as a result of which he sustained fracture of right ulna bone, fracture of incisor teeth and other injuries. When nephew of Uttam came to know about the incident, he immediately went to Bahorik Ram and informed about the incident on which Bahorik Ram came on the scene, and both the accused persons attacked Bahorik Ram with battle axe & Lathi. When Benbai also came to know about the incident, she also went to intervene and she was also assaulted. Bahorik Ram sustained as many as ten injuries out of which there were two incised wounds on the parietal region and other injuries were bruises. On opening of head, the doctor found that in the left parietal region there was extradural haemotoma in the size of 10 cms. x 8 cms. x 6 cms., in the right lateral vertical region there was haemotoma in the size of 10 cms. x 8 cms. x 4 cms., even the right parietal occipital bone was found fractured and there was depression at that place. Therefore, Uttam Kumar, Benbai as well as Bahorik Ram were without any arms. When the accused persons started attacking Uttam Kumar, Bahorik Ram came in order to intervene, they attacked Bahorik Ram and caused as many as ten injuries on vital parts of Bahorik Ram. Thereafter, when Benbai came to intervene, she was also attacked. The injured persons were armless and the accused

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persons attacked Bahorik Ram & Uttam Kumar mercilessly and continuously. They attacked three persons. On facts there was no reason for the accused persons to attack the injured persons in a merciless manner, because Uttam Kumar simply came to take back his calf. Had the calf of Uttam Kumar damaged the Chilli plants of the accused persons, they had legal remedy to take action against Uttam Kumar or his father, or if at all there was any reason, they could have made assault once or twice and stopped there, but they assaulted Bahorik Ram without any reason continuously, they assaulted Uttam Kumar and the poor lady Benbai. This shows the cruel manner in which the accused persons assaulted all the three persons.

25. In the facts and circumstances of the case, we do not find that the attack was made in a sudden fight, in a heat of passion and without preparation, that too without acting in cruel manner. Therefore, the accused persons are not entitled for the benefit of Exception 4 to Section 300 of the I.P.C.

26. Thus, the Court below has rightly convicted the accused persons for commission of offence under Section 302 read with Section 34 of the I.P.C. for committing the murder of Bahorik Ram, Section 323 read with Section 34 of the I.P.C. for causing simple injuries to Benbai and Section 325 of the I.P.C. for causing grievous injuries to Uttam Kumar by Bhakla. However, conviction of accused Rajan under Section 325 read with Section 34 of the I.P.C. is not based on any legal evidence. Therefore, this appeal to that extent succeeds.

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	27. In the result, the criminal appeal in respect of accused/appellant No.1 Rajan succeeds to the extent that his conviction under Section 325 read with Section 34 of the I.P.C. is set aside and sentence imposed upon him under that Section is also set aside, he is acquitted of the said charge. However, conviction and sentences under Sections 302 & 323 read with Section 34 of the I.P.C. imposed on both the appellants are maintained. Consequently, the appeal is dismissed so far as it relates to accused Bhakla and so far as it relates to accused Rajan in respect of conviction and sentences under Sections 302 & 323 read with Section 34 of the I.P.C. 28. Accused Bhakla is on bail. He is directed to surrender to the bail bonds within a period of one month from today. If he fails to surrender, then the trial Court is directed to issue warrant of arrest and get him arrested and lodge him in jail. **Sd/-** **L.C.BHADOO** **Judge**	**Sd/-** **DHIRENDRA MISHRA** **Judge**

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